Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1977

No. 76-1494

FAY ANDERSON; IONA ANDERSON; IONA ANDERSON, MOTHER AND NEXT FRIEND OF CARL ANDERSON, A MINOR; IONA ANDERSON, MOTHER AND NEXT FRIEND OF PAMELA ANDERSON, A MINOR; VIOLET R. HIGGINS; AND ANDERSON BOOKKEEPING AND COMPUTER SERVICE, INC.

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT ~~AND TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT~~

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In The

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October Term, 1977

No. ——

FAY ANDERSON; IONA ANDERSON; IONA ANDERSON, MOTHER AND NEXT FRIEND OF CARL ANDERSON, A MINOR; IONA ANDERSON, MOTHER AND NEXT FRIEND OF PAMELA ANDERSON, A MINOR; VIOLET R. HIGGINS; AND ANDERSON BOOKKEEPING AND COMPUTER SERVICE, INC.

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Eighth Circuit entered January 28, 1977, and the order of the United States Court of Appeals for the District of Columbia Circuit entered March 2, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit dated January 28, 1977 is reported at 548 F. 2d 249 and appears in Appendix "A" hereto. The order entered by the United States District Court for the Northern District of Iowa is unreported and appears in Appendix "B" hereto. The order of the Court of Appeals for the District of Columbia dated March 2, 1977 is unreported and appears in Appendix "C" hereto. The order entered by the United States District Court for the District of Columbia is unreported and appears in Appendix "D" hereto.

———o———

JURISDICTION

The jurisdiction of this Court is invoked urder 28 U. S. C. § 1254 (1).

———o———

QUESTIONS PRESENTED

I. Since the District Courts and Courts of Appeals gave undue deference to the opinions in the other courts, whether this has precluded a fair hearing of the issues involved in the Motions to Dismiss?

II. Since the pleadings did not conclusively show that the actions of the Internal Revenue Service were authorized by Statute, whether the District Courts were correct in dismissing Petitioners' Complaints as barred by the dis-

cretionary function exception to the Federal Tort Claims Act, 28 U. S. C. § 2680 (a)?

III. Since the pleadings did not conclusively show that the negligence complained of occurred at the planning rather than operational level of the Tax Preparers Program, whether the District Courts were correct in dismissing Petitioners' Complaints as barred by the discretionary function exception to the Federal Tort Claims Act, 28 U. S. C. § 2680 (a)?

IV. Since the pleadings did not conclusively show that the actions complained of fall within the exceptions to the Federal Tort Claims Act enumerated in 28 U. S. C. § 2680 (h), whether the District Courts were correct in dismissing the Petitioner's Complaints?

———o———

STATUTORY REGULATIONS INVOLVED

26 U. S. C. § 7206 provides in pertinent part:

"Any person who—

* * *

"(2) Aid or assistance—Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the Internal Revenue laws of a return, affidavit, claim or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim or document; * * * shall be guilty of a felony and, upon conviction thereof, shall

be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

26 U. S. C. § 7602 provides:

"For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any Internal Revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any Internal Revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

"(1) To examine any books, papers, records or other date which may be relevant or material to such inquiry;

"(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony under oath, as may be relevant or material to such inquiry; and

"(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

28 U. S. C. § 2680 provides in pertinent part:

"The provisions of this chapter and section 1346 (b) of this title shall not apply to—

"(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused.

• • •

"(h) Any claims arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

STATEMENT OF THE CASE

The recovery sought by Petitioners is founded upon a series of events set in motion in February, 1973, when agents of the Internal Revenue Service on two separate occasions visited the LeMars, Iowa office of Petitioner, Fay Anderson. Mr. Anderson operated an accounting and tax preparation service in LeMars and various other locations in Iowa. On these two occasions, the agents posing as private citizens engaged Mr. Anderson to prepare income tax returns based on false income and expense data supplied by them.

A short time thereafter, other agents seized files belonging to Mr. Anderson's Remsen and LeMars offices in order to conduct audits of the returns contained therein. During the subsequent audits of his clients, the clients were told that they were being audited solely because of

Mr. Anderson and his possible illegal acts. Petitioners' privacy was invaded due to illegal wiretaps; and finally on April 10, 1973, Mr. Anderson was arrested pursuant to 26 U. S. C. § 7206 for aiding or assisting in or procuring counseling or advising the preparation of a false or fraudulent tax return. In violation of the Internal Revenue Service's own guidelines, announcements were released to the press telling of Mr. Anderson's arrest. At a preliminary hearing before the United States Magistrate, all charges against Mr. Anderson were dismissed as unfounded.

An action was filed by Mr. Anderson against the agents who supplied false information to him in order to induce him into filing false tax returns, which action alleged the violation of his constitutional rights. *Anderson v. Langenwalter,* 33 A. F. T. R. 2d 74-1099 (1974). A second action was filed against the agents alleging illegal search and seizure of his files, illegal arrest and conversion of his property. *Anderson v. Lindsay,* 33 A. F. T. R. 2d 1001 (1974). The agents in both cases were found to be immune from suit since acting within the scope of their employment and the actions were dismissed. The dismissals were affirmed by the United States Court of Appeals for the Eighth Circuit.

On April 14, 1975, a suit was filed by Petitioners in the United States District Court for the District of Columbia Circuit under the Federal Tort Claims Act, 28 U. S. C. § 1346 (a), after a denial of the petitioners' administrative claim. The Petitioners alleged damages due to the negligent implementation of the Internal Revenue Service's Tax Preparers' Program, a program ostensibly designed to lo-

cate tax preparers who prepared incorrect, false or fraudulent income tax returns. Among the acts which petitioners alleged constituted this negligent implementation of the program were the improper training and supervision of the agents enforcing the Tax Preparers Program; the retention in employment of an agent who had previously been guilty of illegal wiretapping and issuing press releases in violation of Internal Revenue Service guidelines; the choice of Mr. Anderson as a target of the program; the invasion of Petitioners' privacy through wiretaps; the conversion of Anderson's files; and the interference with Mr. Anderson's business through harassment of his clients and the adverse publicity generated by the improper press releases to newspapers, radio and television.

On September 17, 1975, a similar suit was filed in the United States District Court for the Northern District of Iowa after the Defendant in the District of Columbia suit moved to dismiss that suit due to improper venue. The Statute of Limitations on the claim was to run on September 19, 1975.

On October 28, 1975, the District of Columbia suit was summarily dismissed on the pleadings as barred by 28 U. S. C. 2680 (a) and (h) and due to improper venue.

On January 30, 1976, the Iowa suit was dismissed on the pleadings as barred by the discretionary function exception of 28 U. S. C. § 2680 (a) and the exceptions to the Federal Tort Claims Act enumerated in 28 U. S. C. § 2680 (h). The decision gave deference to the District of Columbia decision even though the issue of res judicata had not been raised by the Defendant in that suit.

Subsequently on January 28, 1977, the Eighth Circuit Court of Appeals affirmed the decision of the Iowa Court and the District of Columbia Court of Appeals on March 2, 1977 summarily affirmed the decision of the District of Columbia Court based on the Eighth Circuit Court decision.

REASONS FOR GRANTING THE WRIT

I. Due to the handling of the cases in the various courts involved, there has not been a fair hearing of the issues raised in the motions to dismiss.

The United States District Court for the Northern District of Iowa in its third footnote stated that *stare decisis* would compel a result adverse to the petitioners since an identical action had been filed in the District of Columbia and had been dismissed as barred by 28 U. S.C. § 2680 (a). Although the Court did not state how much weight it gave to the decision of the District of Columbia decision, it is apparent that it gave some deference to the decision.

The decision by the District Court for the District of Columbia that it lacked subject matter jurisdiction of the action due to the exceptions to the Federal Tort Claims Act could be an estoppel only as to matters actually adjudicated since it was not a decision on the merits of the claims. *Smith v. Neal,* 109 U. S. 426 (1883); *Mann v. Merrill Lynch, Pierce, Fenner & Smith,* 488 F. 2d 75 (CA 5th, 1973); and *Smith v. Pittsburgh Gage Supply Co.,* 464 F. 2d 870 (CA 3rd, 1972). Filing a similar but not identical

complaint was therefore not precluded if as here the complaint alleged claims not previously alleged and not previously found to be within the Federal Tort Claims Act exceptions. Therefore, the District of Columbia decision could not have the effect given it in the Northern District of Iowa. Furthermore, the Defendant in the Northern District of Iowa did not raise the issue of res judicata in its motion to dismiss and since it is an affirmative defense which can be waived unless relied upon, the issue of res judicata was not before the Court. Rule 8 (c) of the Federal Rules of Civil Procedure. Any consideration by the Court of the issue and the District of Columbia decision was therefore improper and improperly influenced the Court's decision on the merits of the government's motion to dismiss in that court.

The handling of the case was further confused when the District of Columbia Court of Appeals summarily affirmed the District of Columbia District Court decision based on the Eighth Circuit Court decision. The differences in the petitions and the arguments on the motions to dismiss before the lower courts would have precluded the records before the circuit courts from being identical and made a summary affirmance improper.

The handling of the cases by the District Courts of the District of Columbia and the Northern District of Iowa and the Courts of Appeals for the District of Columbia Circuit and Eighth Circuit have therefore precluded the petitioners from a full hearing on the motions to dismiss as well as a full hearing on the merits of their claims. Each court has given undue deference to the decisions in other courts and this deference has resulted in

petitioners being denied due process by denying a full and fair hearing of their claims.

II. The decisions below conflict with prior decisions of this Court and various Courts of Appeals with respect to the test to determine the sufficiency of a complaint brought under the Federal Tort Claims Act.

This court in *Scheuer v. Rhodes,* 416 U. S. 232 (1974), held that a federal court when it reviews the sufficiency of a complaint on a motion to dismiss has a very limited task. The court held:

> "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.
>
> "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson,* 355 U. S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)."

The question of whether to dismiss a complaint becomes more acute when the claims are founded in an area of the law in a state of flux. The extent of governmental liability for its torts is such an area. Since the line be-

tween what is discretionary and what is not is often drawn and redrawn, and the distinctions drawn by these lines are often fine, the difficulties of determining what will subject the government to a suit cannot be determined by merely looking at the pleadings. As stated in *Builders Corporation of America v. United States,* 259 F. 2d 766 (CA 9th, 1958):

> "In this field, where the substantive law is unsettled, it is advisable to hold that a complaint should not be held without merit unless it is absolutely clear that no cause of action could be stated given the actual facts, especially where a statutory exception is relied upon.
>
> . . .
>
> "It is the announced position of the office of the Attorney General that cases against the government will be disposed of on the merits rather than on technical interpretations of the pleadings."

Similar views were expressed in *Fair v. United States,* 234 F. 2d 288 (CA 5th, 1956); *Spohn v. United States,* 16 F. R. D. 240 (S. D. N. Y., 1954), and *White v. United States,* 317 F. 2d 13 (CA 4th, 1963). The latter dealt with a summary judgment based on the pleadings and the evidence from a pre-trial hearing on the government's affirmative defenses. *White* states:

> "The Tort Claims Act does not define 'discretionary function', and each case must be measured against the broad spectrum of administrative power which ranges from the establishment of programs, issuance of regulations, and the granting of licenses to narrow decisions where administrative discretion stops and liability in tort begins."

In the instant case only a hearing on the merits could show whether there was statutory authority for the actions

taken by the Internal Revenue Service and that there was therefore any exercise of administrative power at all in this case. Only through such a hearing could it also be determined if the alleged negligence occurred at the planning or operational level of the spectrum of administrative power discussed in *White*. Since the decisions of the District Courts precluded such a hearing on the merits, it is clearly contrary to previous decisions of this Court and various Courts of Appeals.

III. The decisions of the lower courts squarely conflict with prior decisions of this Court and various Courts of Appeals with respect to whether there was statutory authority for the tax preparer's program.

Before any action by the government or one of its agents or officers is protected by the discretionary function exception to the Federal Tort Claims Act, there must be a statutory basis for the action. *Dalehite v. United States*, 346 U. S. 15 (1953); *Indian Towing Co. v. United States*, 350 U. S. 61 (1955); *Rayonier, Inc. v. United States*, 352 U. S. 315 (1957); and *Eastern Airlines, Inc. v. Union Trust Company*, 221 F. 2d 62 (D. C., 1955).

Both 26 U. S. C. § 7206 and § 7602 have been cited as the authority for establishing and implementing the Tax Preparers Program, a program ostensibly designed to locate tax preparers who completed inaccurate, false or fraudulent tax returns. Both statutes, however, are aimed at ascertaining whether tax monies due to the government have been paid and to punish the filing of a false or fraudulent tax return. *United States v. Bisceglia*, 420

U. S. 141 (1975); *Donaldson v. United States*, 400 U. S. 517 (1971); *United States v. Turner*, 480 F. 2d 272 (CA 7th, 1973); and *United States v. Miller*, 491 F. 2d 638 (CA 5th, 1974). Neither statute is aimed at or allows the policing of the accounting profession. *United States v. Theodore*, 279 F. 2d 749 (CA 4th, 1973). Since these statutes did not authorize the policing of the accounting profession, neither statute can be the basis of the Tax Preparers Project which was designed for such a purpose.

If the government had reason to believe that a tax preparer was not properly and accurately completing tax returns because returns completed by him were possibly inaccurate or fraudulent, an investigation of the preparer would be proper as long as conducted according to procedures previously developed. The procedures outlined in *United States v. Turner* as well as *United States v. Theodore;* and *United States v. Berkowitz*, 488 F. 2d 1235 (CA 3d, 1973) would be to seek by a summons from the preparer the names and social security numbers of the preparer's clients. If an audit of these clients' returns showed that the government was correct in suspecting that the preparer was negligently or fraudulently preparing incorrect tax returns, an action against the preparer would be proper.

In the instant case these procedures were not followed and instead a fishing expedition through Petitioners' files was conducted to determine if he had incorrectly completed and filed any returns. Similar actions were held improper in *United States v. Theodore; United States v. Harrington*, 388 F. 2d 520 (CA 2d, 1968); and *United States v. Dauphin Trust Co.*, 385 F. 2d 129 (CA 3d, 1967).

This fishing expedition was conducted after agents of the government had attempted to induce Mr. Anderson to file False tax returns based on the false income and expense data supplied by them. Any attempt to induce the filing of such a false return punishable under 26 U. S. C. § 7206 would constitute an attempt to entrap Mr. Anderson into the commission of a crime, an attempt clearly violating his constitutional rights under *Sorrells v. United States,* 287 U. S. 435 (1932).

Therefore, even if there was a statutory basis for a tax preparer's program, the procedures used in the Tax Preparer's Program actually instituted were clearly unconstitutional since they allowed government agents to entrap a tax preparer and either institute criminal proceedings or at least a criminal investigation against him and to allow searches through his files before having probable cause to do so.

IV. The decisions of the lower courts squarely conflict with decisions of various circuits on the determination of the distinction between the implementation and the planning of a governmental program.

If it is found that there is a statutory basis for the Tax Preparer's Program and that the procedures followed are constitutional, it must be determined if there was negligence in the implementation of the program in the instant case. If due care is not exercised or the regulations and guidelines of the agency are not followed, the government would be liable for the torts and negligence of its agents. *Griffin v. United States,* 500 F. 2d 1059 (CA 3rd, 1974); and *Dalehite v. United States,* 346 U. S. 15 (1953).

The Eighth Circuit Court held that findings in the suits by Fay Anderson against the Internal Revenue Service agents that they were acting within the scope of their employment precluded suits against the government based on these actions. This holding is clearly erroneous based on *Hatahley v. United States,* 351 U. S. 173 (1956). In that case this Court held there is an area in which a government agent can act beyond his actual authority and yet be acting within the scope of his employment. In fact, it is necessary to find that the agent is acting within the scope of his employment before the government can be held liable for his actions. 28 U. S. C. 1346 (b) of the Federal Tort Claims Act requires such a finding.

Contrary to the findings of the lower courts, in the instant case a hearing on the merits would be necessary to determine if the negligence complained of occurred at the implementation rather than the planning stages of the program. As in *White v. United States,* 317 F. 2d 13 (CA 4th, 1963) it would be necessary to determine where on the spectrum of governmental activity the actions complained of occurred.

After the United States exercised its discretion to establish the Tax Preparer's Program, its officers and agents could not negligently or tortiously enforce its goals any more than the tower personnel in *Ingham v. Eastern Air Lines, Inc.,* 373 F. 2d 227 (CA 2d, 1967) had any discretion to operate the control tower in a negligent manner after the government exercised its discretion in establishing the tower.

In applying the criteria of previous decisions to determine the distinction between the planning and opera-

tional levels, it is not clear from the pleadings that the discretionary function exception necessarily applies. It is not sufficient to point out that some decision-making power was exercised by the official whose act is being questioned. *Griffin*; *Hatahley*; *Downs v. United States*, 522 F. 2d 990 (CA 9th, 1975); and *Builders Corporation of America v. United States*, 259 F. 2d 766 (CA 9th, 1958). It is necessary to remember that the purpose behind the exception is to insulate the government from liability for its policy and rule making functions and only by determining that there was such a policy or rulemaking function involved can a discretionary function be found. *American Exchange Bank v. United States*, 256 F. 2d 938 (CA 9th, 1958); *Taxay v. United States*, 345 F. Supp. 1284 (D.C. 1972), affirmed 487 F. 2d 1214 (D. C., 1973).

It would therefore appear that it could be shown that negligence occurred at the implementation rather than planning level of the program and the motion to dismiss was improperly granted in this case.

V. The decisions of the lower courts squarely conflict with prior decisions of this Court and various Courts of Appeals with respect to what constitutes an exception to the Federal Tort Claims Act under 28 U. S. C. § 2680 (h).

Consideration of the pleadings shows that actions not excluded by 28 U. S. C. § 2680 (h) were alleged by petitioners and therefore, the motion to dismiss was not properly granted.

As in *Brown v. United States*, 416 F. 2d 284 (CA 8th, 1974) and *Gibson v. United States*, 457 F. 2d 1391 (CA 3rd,

1972) the suit was based on negligence and the fact that an assault and battery resulted from the negligence does not bring the claim within the exceptions of 28 U. S. C. § 2680 (h). Further actions by the agents do not fall within the enumerated exceptions of 28 U. S. C. § 2680 (h). These include invasion of privacy through wiretapping, *Zweibon v. United States*, 516 F. 2d 594 (D. C., 1975); trespass, *Hatahley v. United States*, 351 U. S. 173 (1956); illegal seizure of property, *DeBonis v. United States*, 103 F. Supp. 123 (W. D. Pa., 1952); and tortious interference with business, *Colorado Insurance Group, Inc. v. United States*, 216 F. Supp. 781 (Colo., 1963).

CONCLUSION

For the foregoing reasons, the Court should grant the writ.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 76-1325

FAY ANDERSON, et al.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal From the United States District Court
for the Northern District of Iowa

Before LAY, BRIGHT, and WEBSTER, Circuit Judges

George T. Qually, Sioux City, Iowa, filed brief for Appellant.

Evan L. Hultman, U. S. Atty., Sioux City, Iowa, Scott P. Crampton, Asst. Atty. Gen., Gilbert E. Andrews, Chief, Appellate Section and Michael L. Paul and Francis J. Gould, Attys. Tax Div., Dept. of Justice, Washington, D. C., filed brief for Appellee.

Filed: January 28, 1977

PER CURIAM.

Fay Anderson and members of his family seek redress under the Federal Tort Claims Act for invasion of privacy, wiretapping, and damage to business and reputation allegedly resulting from negligent design and implementation of the Internal Revenue Service's Tax Preparer's Program. The district court for the Northern District of Iowa (McManus, C. J.) dismissed the action pursuant to 28 U. S. C. § 2680 (a), the so-called discretionary acts exception to the FTCA, and 28 U. S. C. § 2680 (h), which bars claims under the FTCA for, among other things, malicious

prosecution, abuse of process, libel, slander, or interference with contract rights. We affirm the order of the district court.

Appellant Fay Anderson is an accountant practicing in LeMars, Iowa. Appellants allege that in February, 1973, as part of its Tax Preparer's Program, which was designed to locate dishonest or incompetent tax preparers, two IRS agents visited Anderson's LeMars office and, using false identities and manufactured income and expense statements, secured Anderson's assistance in preparing income tax returns. Anderson alleges that shortly thereafter other IRS agents visited his offices in LeMars and Remsen, Iowa, and, after advising Anderson of his rights and securing his permission, took with them a total of 132 of Anderson's files. The IRS audited the returns in these files and interviewed some of Anderson's clients with respect to these returns. On April 10, 1973, the IRS agent who took Anderson's files arrested Anderson pursuant to an arrest warrant for an alleged violation of § 7206 (2) of the Internal Revenue Code, which prohibits willful aiding, assisting, procuring, counseling or advising the preparation of a false or fraudulent tax return. The local news media reported Anderson had been arrested. However, at the preliminary hearing on April 30, 1973, the magistrate dismissed the criminal charges against Anderson.

Anderson then filed suit against the Internal Revenue Service personnel involved in his investigation and arrest. The district court for the Northern District of Iowa dismissed these actions, holding that the IRS agents were acting at all relevant times within the scope of their authority and duties, and therefore that they were immune to suit. *See Anderson v. Langenwalter,* 33 A. F. T. R. 2d 74-1099 (N. D. Ia., Mar. 22, 1974); *Anderson v. Lindsay,* 33

A. F. T. R. 2d 74-1001 (N. D. Ia., Mar. 6, 1974). This court affirmed those decisions in an unreported order, Nos. 74-1496 and 74-1515 (8th Cir., Dec. 30, 1974). Anderson then turned to the Federal Tort Claims Act for relief. This action was filed on September 17, 1975, in the district court for the Northern District of Iowa.[1] The district court, in January 1976, dismissed the action, and the Anderson family brings this appeal.

The Andersons advance three theories which they believe are not barred by 28 U. S. C. § 2680 (a), the discretionary acts exception to the FTCA. First, they assert that the entire Tax Preparer's Program was unauthorized by statute, and therefore the IRS agents' actions fall outside the discretionary acts doctrine. We reject this argument. The Secretary of the Treasury and his delegate, the commissioner of Internal Revenue, are authorized to examine books, papers, records and other data which may be relevant to the accuracy of any tax return. *See* 26 U. S. C. §§ 7602 (1), 6213, and 6402. Obviously, the records maintained by Anderson may well have been relevant to the determination of Anderson's customers' tax liabilities. Moreover, 26 U. S. C. § 7206 (2), which prohibits aiding or assisting in the preparation of false or fraudulent tax returns, provided more than adequate statutory authorization for the Commissioner's Tax Preparer's project.

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1 We note that the allegations in this action are almost identical to those contained in an action filed by appellants in the district court for the District of Columbia, *Anderson v. United States*, Civ. 75-0542 (D. C. Cir.). The District of Columbia court dismissed Anderson's complaint for improper venue, and also under 28 U. S. C. §§ 2680 (a) and (h). The Government argues in its brief that the District of Columbia litigation bars this action under the doctrine of *res judicata*. Although appellants do not raise it in their brief, we note that the Government did not present this defense to the district court in its motion to dismiss. We, therefore, decline to reach this issue on appeal.

Appellants' second contention is that the IRS agents acted in excess of their authority in that they violated the agency's own rules regulating the investigation of such cases and the dissemination of information to the public concerning such investigations. Apart from the fact that this allegation appears nowhere in the complaint,[2] it is apparent that this allegation was decided adversely to appellant Fay Anderson in his prior actions against the individual IRS agents. In those actions, the district court specifically found that the agents were acting at all relevant times within the scope of their authority and duties. *See Anderson v. Langenwalter, supra; Anderson v. Lindsay, supra.* The plaintiff cannot be allowed to relitigate these allegations yet another time.

Anderson's third and final attempt to escape from the discretionary acts doctrine is the argument that the negligence complained of took place at the operational stage. With respect to this argument, we find the district court's analysis entirely persuasive:

> (P)laintiffs * * * characterize the alleged negligence as having been committed by officials of the IRS

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2 The operative facts alleged in the complaint are contained entirely in paragraphs 4 and 5.

> 4. Prior to February of 1973, the Internal Revenue Service, instituted a much publicized program purportedly designed to crack down on fraudulent tax preparers. The establishment and effectuation of the program was left to subordinate officials and agents of the Commissioner of Internal Revenue. Such subordinate officials were negligent in the directives and instructions given to the agents in the field.
>
> 5. As a result, plaintiff, Fay Anderson, was subjected to unconstitutional invasion of his right of privacy, wiretapping, surveillance by Internal Revenue agents, unconstitutional search and seizure, arrest without probable cause and widespread adverse newspaper, radio and television publicity.

in the establishment and effectuation of its "tax preparer's program." Insofar as the complaint alleges such specific acts as unlawful search and seizure, false arrest, and libel, these are not set forth as the direct acts of negligence but as the natural and probable consequences of negligence in formulating the objectives of the program and plans for its implementation. It is the court's view that these actions by IRS officials fall within the planning, as opposed to operational, stage of the program, and are classic examples of the type of decisions wherein policy factors are weighed in making the final judgment.

Thus, we are persuaded that appellants' claims are barred by 28 U. S. C. § 2680 (a), the discretionary acts exception to the FTCA.

We also agree with the district court's conclusion that the claim based upon Fay Anderson's arrest and the attendant publicity and damage to Anderson's reputation is also barred by the express provisions of § 2680 (h).[3]

The order of the district court is affirmed.

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3 On March 16, 1974, the following proviso was added to 28 U. S. C. § 2680 (h):

Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346 (b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

We need not consider the implications of this amendment, because the actions complained of here took place in 1973, before the proviso was enacted.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. C-75-4060

FAY ANDERSON, et al.,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

ORDER

This matter is before the court on defendant's resisted motion to dismiss, filed November 18, 1975.

Plaintiffs commenced this action under the Federal Tort Claims Act (Act), 28 USC §§ 1346 (b), 2671 *et seq.*, seeking to recover damages allegedly incurred as a proximate result of negligent acts committed by officials of the Internal Revenue Service (IRS) while the latter were acting within the scope of their duties. The United States moves to dismiss on the ground that the actions alleged are within the exceptions contained in 28 USC § 2680 to the Act's grant of jurisdiction.

Any claim against the United States is subject to the established principle that, "The United States, as sovereign, is immune from suit save as it consents to be sued (citations omitted) and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Sherwood*, 312 U. S. 584, 586, 61 S. Ct. 767, 769, 85 L. Ed. 1058 (1941); *United States v. Shaw*, 309 U. S. 495, 500-507, 60 S. Ct. 659, 84 L. Ed. 888

(1940). Congress, in enacting the Federal Tort Claims Act, has defined certain conditions under which the United States has waived its immunity from suit, and it is incumbent upon a claimant to bring his cause of action within the jurisdictional limits circumscribed by the Act. *Konecny v. United States,* 388 F. 2d 59, 62 (8th Cir. 1967). The exceptions listed in 28 USC § 2680 thus relate to the issue of subject matter jurisdiction, *Gibson v. United States,* 457 F. 2d 1391, 1392 n. 1 (3rd Cir. 1972); *Konecny, supra* at 62, and defendant's motion will be treated as made under Rule 12 (b) (1), FRCP.

Defendant urges that the circumstances alleged by plaintiffs are outside the bounds of the Act because they are within one or all of the following statutory exceptions: (1) a claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty, § 2680 (a); (2) a claim arising in respect of the assessment or collection of any tax, § 2680 (c); and (3) a claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights, § 2680 (h).[1] It is the view of the court that defendant's motion is well taken with respect to the exceptions set forth in § 2680 (a) and (h), and these being dispositive, it is unnecessary to consider whether § 2680 (c) would also be applicable.

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1 Subsection (h) was amended by Congress in 1974, Pub. L. 93-253, § 2, 88 Stat. 50, but that amendment by its own terms is inapplicable to events, as alleged here, which occurred prior to its enactment.

The seminal decision construing the "discretionary function" exception of § 2680 (a) was *Dalehite v. United States,* 346 U. S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953), wherein the court commented on the parameters for determining discretionary acts as follows:

> The "discretion" protected by the section is not that of the judge—a power to decide within the limits of positive rules of law subject to judicial review. It is the discretion of the executive or the administrator to act according to one's judgment of the best course. . . .
>
> . . .
>
> It is necessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations.
>
> 346 U. S. at 34-36

Subsequent cases have declared that an absolutist interpretation of discretionary function is improper. *J. H. Rutter Mfg. Co., Inc. v. United States,* 515 F. 2d 97, 99 (5th Cir. 1975). It is not sufficient for the Government to show that some choice was involved in the decision-making process, but rather the nature of the judgment must call for the balancing of policy considerations. *Rutter, supra* at 99; *Griffen v. United States,* 500 F. 2d 1059, 1063-1064 (3rd Cir. 1974).

In the case at bar the complaint and plaintiffs' brief in resistance to the instant motion characterize the alleged negligence as having been committed by officials of the IRS

in the establishment and effectuation of its "tax preparer's program". Insofar as the complaint alleges such specific acts as unlawful search and seizure, false arrest, and libel, these are not set forth as the direct acts of negligence but as the natural and probable consequences of negligence in formulating the objectives of the program and plans for its implementation. It is the court's view that these actions by IRS officials fall within the planning, as opposed to operational, stage of the program, and are classic examples of the type of decisions wherein policy factors are weighed in making the final judgment.[2] Hence they are encompassed within the "discretionary function" exception of § 2680 (a).[3] *See Dalehite, supra; Rutter, supra; Konecny, supra; Smith v. United States,* 375 F. 2d 243 (5th Cir. 1967), *cert. denied* 389 U. S. 841, 88 S. Ct. 76, 19 L. Ed. 2d 106 (1967).

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2 Plaintiffs challenge the statutory authority of the IRS to establish any program of investigating taxpayers, and as a corollary thereof, assert that no discretion existed to be exercised by the IRS officials. However, the courts have indicated that the IRS has a legitimate interest in determining the tax liability of persons who utilize services of a tax preparer, and may issue summonses to aid that determination under the authority of 26 U. S. C. § 7602. *United States v. Carter,* 489 F. 2d 413 (5th Cir. 1973); *United States v. Berkowitz,* 488 F. 2d 1235 (3rd Cir. 1973); *United States v. Turner,* 480 F. 2d 272 (7th Cir. 1973).

3 Although not relied upon by plaintiffs, it appears that *stare decisis* would also compel a result adverse to plaintiffs. An identical action was filed in the Federal District Court for the District of Columbia, and the court there granted a motion to dismiss on October 28, 1975, relying on improper venue *and* the bar of 28 U. S. C. § 2680 (a). That ruling, as in deciding the instant motion, necessarily assumed the pleaded facts as true as was determined as a question of law.

To the extent that the complaint can be read to allege negligent or wrongful acts in the nature of false arrest, malicious prosecution, libel, slander, and misrepresentation, the action would also be barred by the express provisions of § 2680 (h).

It is therefore
ORDERED
Dismissed.

January 29, 1976

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1060
Civil Action 75-0542

FAY ANDERSON, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

ORDER

Before: Tamm, Robinson and Robb, Circuit Judges

On consideration of appellee's motion for summary affirmance and of the response thereto, it is

ORDERED by the Court that the aforesaid motion for summary affirmance is granted.

Per Curiam

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-542

FAY ANDERSON, et al.,

Plaintiffs,

vs.

UNITED STATES,

Defendant.

ORDER

Upon consideration of defendant's Motion to Dismiss, the memoranda of points and authorities in support thereof and in opposition thereto, oral argument of counsel having been heard, and it appearing to the Court that this action is barred by 28 U. S. C. §§ 2680 (a), (h) and by 28 U. S. C. § 1402 (b), it is by the Court this 28th day of October 1975.

ORDERED that defendant's Motion to Dismiss be, and the same hereby is, granted.

Supreme Court, U. S.
FILED
JUN 14 1977
MICHAEL RODAK, JR., CLERK

No. 76-1494

In the Supreme Court of the United States

OCTOBER TERM, 1976

FAY ANDERSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1494

FAY ANDERSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners seek damages against the government under the Federal Tort Claims Act (28 U.S.C. 1346(b)) on the ground that several agents of the Internal Revenue Service negligently designed and implemented a government program to investigate certain commercial tax return preparers. The courts below held that petitioners' suit was barred by the statutory exceptions to the Federal Tort Claims Act set forth in 28 U.S.C. 2680(a) and (h), relating to discretionary functions and to claims of slander and malicious prosecution.

The pertinent facts are as follows: Petitioner Fay Anderson was in the business of preparing tax returns. Pursuant to an investigation of tax return preparers, two Internal Revenue Service agents engaged petitioner to prepare tax returns on the basis of data they supplied to

him. Some time later, another Internal Revenue Service agent visited petitioner's offices and, after informing him of his rights, asked to examine his files. Petitioner consented to these examinations and further agreed to let the agent take certain of the files back to his office (Pet. App. A, pp. A. 1-A. 2).

On the basis of information derived from these files and from interviews with certain of Anderson's clients, an agent of the Internal Revenue Service filed a complaint against him before a United States magistrate, charging him with aiding and assisting in the preparation and presentation of false and fraudulent income tax returns, in violation of 26 U.S.C. 7206(2). Pursuant to an arrest warrant the magistrate issued, the agent arrested petitioner and immediately took him before a magistrate, who set a date for a preliminary hearing and ordered him released on his own recognizance. After the preliminary hearing, the magistrate dismissed the charges against Anderson (Pet. App. A, p. A. 2).

Thereafter, Anderson filed suit in the United States District Court for the District of Iowa against the Internal Revenue Service agents involved in the investigation, seeking damages from the agents personally for the allegedly unlawful searches and arrest. The district court dismissed petitioner's suit on the ground that the agents were immune from suit, under both an absolute or a qualified immunity standard, on the ground that they had acted in good faith within the scope of their authorized duties (*Anderson* v. *Lindsay*, 33 A.F.T.R. 2d 1001; *Anderson* v. *Langenwalter*, 33 A.F.T.R. 2d 1099). The court of appeals affirmed (508 F. 2d 846), and this Court denied certiorari (421 U.S. 962).

Anderson then joined with the other petitioners to bring the present action against the United States under

the Federal Tort Claims Act. The complaint alleged that negligence by governmental officials in "formulating the objectives" of the investigatory program and in devising "plans for its implementation" (Pet. App. B, p. A. 9) had resulted in unlawful searches of Anderson's offices, his unlawful arrest and other illegal invasions of petitioners' rights. The district court held that the suit was barred by 28 U.S.C. 2680(a) and (h), which prohibits suits under the Federal Tort Claims Act for recovery of damages resulting from the exercise of "discretionary functions" and from false arrest, libel and slander (Pet. App. B, pp. A. 6-A. 10).[1] The court of appeals affirmed *per curiam* (Pet. App. A, pp. A. 1-A. 5).

The courts below correctly held that petitioners could not relitigate their prior suit against the Internal Revenue agents by suing the government under the Federal Tort Claims Act. The Secretary of Treasury or his delegate, the Commissioner of Internal Revenue, has ample authority to investigate those who prepare tax returns. *United States* v. *Carter*, 489 F. 2d 413 (C.A. 5); *United States* v. *Turner*, 480 F. 2d 272 (C.A. 7); *United States* v. *Theodore*, 479 F. 2d 749 (C.A. 4); 26 U.S.C. 6201, 6212, 6402, 7206(1) and (2).

The particular fashion in which he discharges this statutory responsibility necessarily involves substantial discretion. Here, petitioners' complaint is that Treasury officials acted "negligently" when they established the

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[1]Petitioners filed an identical suit in the United States District Court for the District of Columbia. The district court likewise dismissed the action as barred by 28 U.S.C. 2680(a) and (h) and, in addition, for improper venue (28 U.S.C. 1402(b)) (Pet. App. D, p. A. 12). The court of appeals affirmed *per curiam* (Pet. App. C, p. A. 11).

guidelines and issued the directives for a program to investigate various commercial tax return preparers. But those actions were policy level discretionary acts. Suit based upon them is barred by 28 U.S.C. 2680(a), which prohibits suit under the Federal Tort Claims Act for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty * * * whether or not the discretion involved be abused." *Dalehite* v. *United States*, 346 U.S. 15. This "discretionary function or duty" exception to the Tort Claims Act extends not only to "determinations made by executives or administrators in establishing plans, specifications or schedules of operations," but also to the "acts of subordinates in carrying out the operations of government in accordance with official directions." *Dalehite* v. *United States*, 346 U.S. at 35-36.[2]

Moreover, the courts below correctly held (Pet. App. A, p. A. 5; Pet. App. B, p. A. 10) that petitioners' claims seeking recovery for damages allegedly resulting from Anderson's arrest and the attendant publicity are also barred by 28 U.S.C. 2680(h),[3] which precludes suits presenting claims "arising out of * * * false imprisonment, false arrest,

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[2]As the court of appeals noted (Pet. App. A, p. A. 4), petitioners did not set forth in their complaint their claim (Pet. 14-15) that the Internal Revenue Service agents did not follow the guidelines issued by their agency. At all events, this claim is substantially undercut by the decision in the prior suit that the agents acted in good faith and within the scope of their authority.

[3]Congress amended 28 U.S.C. 2680(h) in 1974, Act of March 16, 1974, Section 2, 88 Stat. 50, to provide that recovery might be had under the Federal Tort Claims Act for "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" claims resulting from the "acts or omissions of investigative or law enforcement officers." But that amendment is, by its own terms, inapplicable to events, as in this case, that occurred prior to its enactment.

malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JUNE 1977.

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[4]Although the courts below found it unnecessary to address the question (Pet. App. B, p. A. 8), petitioners' suit is also barred by 28 U.S.C. 2680(c), which bars tort claims involving "any claim arising in respect of the assessment or collection of any tax * * *." *United States* v. *Worley*, 213 F. 2d 509 (C.A. 6); *Broadway Open Air Theatre* v. *United States*, 208 F. 2d 257 (C.A. 4).

DOJ-1977-06